No. 16020

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. NADINE RODGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Introduction.

This brief is filed in reply to the brief of the appellee, United States of America, filed herein which seeks to sustain the conviction of appellant E. Nadine Rodgers on a charge of illegal importation of narcotics in violation of Title 21, U. S. C. A., Section 174, as amended July 18, 1956.

As stated at page 13 of appellant's opening brief, appellant admits that she did import heroin into this country from Mexico. Faced with the existence of such an act, the court is confronted with a powerful temptation to justify the conviction on any plausible ground. This is a hard case on the facts, and hard cases tend to make bad law. Appellant is confident that this Honorable Court will, despite the many frivolous legal callisthenics indulged

in by the government, cut through such obfuscations and dispassionately decide the case on the four major issues framed by the appellant's opening brief. These issues are basically: (1) the unlawful violation of appellant's rights under the Fourth Amendment by the action of Agents Gates and Spohr in arresting her without a warrant and without probable cause (App. Op. Br. pp. 13-42); (2) the correctness of three of the findings of fact (App. Op. Br. pp. 42-48); (3) the correctness of seven of the conclusions of law (App. Op. Br. pp. 49-59); (4) the error committed by the trial court in refusing to permit defense counsel to inspect a report prepared by and used by a government agent-witness in testifying (App. Op. Br. pp. 49-64).

II.

Appellant's Arrest and Subsequent Search Were Made in Violation of Her Rights Under the Fourth Amendment to the Constitution.

The circumstances leading to appellant's arrest are set out in appellant's opening brief at pages 2-6 and 18-20 and in the government's brief at pages 2-5. While no good purpose would be served by restating *ex extensio* the facts upon which the agents acted, the following is a brief summary of the information in their possession at the time of appellant's arrest:

(1) There was a suitcase containing woman's clothing in Evan Rodger's car.

(2) Evan Rodgers had a $2,000 cashier's check on his person.

(3) Gilbert Martinez stated that appellant had carried heroin across the border and was waiting for her husband in San Diego.

(4) Appellant was in San Diego near the place where Martinez had said she would be.

(5) Appellant admitted her identity to Agent Spohr.

Other information in the possession of the agents related to the question of Martinez's reliability and was not directed to the probability of appellant's guilt or lack of it. Great stress is apparently placed by the government upon the circumstances that woman's clothing was contained in Evan Rodgers' car and that Evan Rodgers carried a $2,000 check on his person when apprehended. Yet it is not unreasonable for a woman travelling far from home with her husband to leave some of her luggage in the car when her husband is going to take the car for a 150-mile trip. In any event, not only can no guilty inference be attached to the presence of the clothes, but they are nowhere identified as belonging to appellant. Appellant urges that the mere presence of unidentified woman's clothes in Rodgers' car can reflect upon appellant's probable guilt or upon the validity of Martinez's story only by the broadest exercise of supposition, conjecture, and surmise on the part of the arresting officers. The existence in the minds of the agents of probable cause to arrest appellant is not supported by the presence of the clothes in the car. Nor was the possession by Evan Rodgers of a $2,000 cashier's check of any corroborative significance. Rodgers told the agents that this check represented part of the proceeds of a real estate transaction. The government, at pages 18 and 19 of its brief, attempts to create *nunc pro tunc* in the minds of the agents the thought that a $2,000 cashier's check in the possession of a person with a prior narcotics record might well be indicative of the fact that the person had

just been involved in a narcotics transaction. Appellant submits that this Honorable Court can take judicial notice of the fact that narcotics purchases are seldom made by cashier's check. Accordingly, no significance is attributable to Evan Rodgers' possession of the check.

Additionally, it should be noted that both of the aforementioned bits of alleged corroboration were unearthed in the possession of one other than appellant and lend no support one way or the other to the probable cause the agents may have had to arrest her. Without the check and the clothes, neither of which should be considered corroborative, the sole facts upon which the agents founded their decision to arrest appellant were that a man previously unknown to them personally or by reputation and, as far as they could ascertain, of extremely dubious character told them that a woman whose very existence was unknown to them had carried heroin into the United States and was at that time in San Diego. This is a classic example of an arrest by officers in reliance upon information supplied by an informant of unknown reliability. Under the established authorities, an arrest founded upon such flimsy grounds is unlawful as being in violation of the arrested person's constitutional rights under the Fourth Amendment.

The government in stressing the opportunity of the agents to observe Martinez firsthand throughout a protracted interrogation confuses the basis of the rule against arrests based upon information supplied by informants of unknown reliability. It is not the identity of the informant which must be known, nor is it the opinion or impression which the agents gain of him during their

interrogation; it is the proven reliability of the informant which is of prime importance. As so aptly stated in

> *United States v. Clark* (1939), 29 Fed. Supp. 138 at 140,

there must be some showing "that the informer's information was itself more than mere guess-work and speculation." Needless to say, the information must be vindicated, if at all, prior to the arrest made in reliance upon it and not by reason of the fruits of the arrest and the resulting search.

> *United States v. Di Re* (1948), 332 U. S. 581, 92 L. Ed. 210, 220.

Of interest to show that, contrary to the tenor of appellee's argument, the opportunity of arresting officers to observe an informer's demeanor face to face does not vary the rule that reliability of the informant, rather than his identity, must be known is the case of

> *People v. Goodo* (1956), 147 Cal. App. 2d 7, 304 P. 2d 776.

In that case, as in the instant case, the police were personally contacted by an informant previously unknown to them either personally or by reputation. This informant informed the officers that Goodo kept marihuana in his room. The police had an opportunity to speak to and observe this informant for nearly an hour and in his company went to Goodo's apartment where they intercepted Goodo as he came out of the door of his room with a brown paper sack in his hand. Goodo was arrested; the sack contained contraband; and Goodo was convicted. Upon appeal the conviction was reversed, the

court stating at page 9 of the California Appellate Report:

> "The question here presented is whether the information given by Bruce to the officers, coupled with their observation of appellant leaving his living quarters with a brown paper sack in his hand, was sufficient to constitute reasonable cause to believe that appellant was guilty of a felony.
>
> "It appears that the officers had not previously known Bruce or had any contact with him and that they did not know his reputation or any other fact which would assist in evaluating his reliability. In the absence of any emergency, 'an arrest may not be based solely on such information.' "

See also:

> *Willson v. Superior Court* (1956), 46 Cal. 2d 291, 294 P. 2d 36.

In the instant case, the mere fact that the agents had Martinez before them, observed his demeanor, and established his identity in no way affects their knowledge of his reliability. As it turned out Martinez's information was correct and he might, consequently, *at the present time* be considered "reliable" in a legal sense, but the fact remains that at the time the agents acted they were utterly in the dark as to whether or not Martinez was a reliable informant.

The government seeks to substitute for the standard of known reliability the evaluation of the informant's demeanor gained by the officers during interview and, on this ground, seeks to distinguish appellant's cases where the informant was anonymous. It is, perhaps, significant that no citation of authority is given in support of this somewhat startling concept which would apply to police

officers the same aura of sacrosanctity which is presently accorded trial judges in their evaluation of the demeanor of witnesses. Such a rule, if followed, would substitute the officers' *opinion* as to the reliability of the informant in place of definite knowledge of said informant's reliability. The dangers of such a policy are immediately apparent since the Fourth Amendment interdictions would possess no more protection than the character evaluating ability of each individual arresting officer. Caprice, whimsy, and even deliberate falsification would replace the present necessity for showing definite knowledge of an informant's prior reliability. In a government of laws—not men—such a circumstance cannot be tolerated.

In the instant case, the officers had no concrete reason to suspect that Martinez's story was other than mere guess-work. Various factors which the government seeks to use in buttressing the unfounded suspicions of the agents are either equally susceptible to contrary interpretation or are completely unfounded in the record. Thus on page 10 of the government's brief, the appellee has indulged in speculation, stating:

> *"It is obvious from the transcript that Martinez and Rodgers did not have a chance to get together on their stories while being interrogated by the Customs agents."*

The record is silent on this aspect of the case, the sole utterance to this effect being the unsupported allegation of government's counsel just quoted.

On pages 12 and 13 of the appellee's brief, the government represents that Agent Spohr checked local police records and discovered only a minor violation of the law by Martinez. There is no support whatsoever in the

record for this statement. At page 13 of its brief, the government engages in "inference" to arrive at the conclusion that Evan Rodgers' prior arrest was verified by the State Narcotics Bureau. Whether Officer Bud Hawkins of the State Narcotics Bureau did or did not state that Evan Rodgers had a prior narcotics record remains unknown from a reading of the record. The correct statement of the testimony on that subject is set forth at page 12 of appellant's opening brief. The government again resorts to inference on this point; the appellant relies upon the record.

Again at page 19 of its brief the government seeks corroboration in Martinez's mouthings of the names of members of the Federal Bureau of Narcotics in San Francisco. This information could be material only if considered by the agents in establishing Martinez's reliability inasmuch as he claimed to have known these men through alleged work as an informer. It is submitted that such a conclusion is not compelled by Martinez's mere mention of these names nor, in view of Martinez's admitted familiarity with the narcotics racket from the wrong side of the law, is it justified in that it is at least equally probable that Martinez knew of these men in the same way any narcotics addict might know the names of the small group of agents who seek to enforce the narcotics laws. In any event, as pointed out at pages 39-41 of appellant's opening brief, probable cause to arrest without a warrant cannot be predicated upon information provided by an informant whose *reliability* is unknown to the arresting agent personally even though the reliability of the informer is vouched for by another party of known reliability.

> *Gilliam v. United States* (6th Cir., 1951), 189 F. 2d 321, 325, dissenting opinion.

If Martinez's reliability could not be validly authenticated for the arresting agents' purposes by confirmation by one of the named San Francisco narcotics agents, how then can it be successfully contended that, when the situation is one step further removed, Martinez can authenticate his own reliability by merely mentioning the names of some of those agents? At page 20 of the government's brief, appellee attempts to corroborate Martinez's story by the allegedly suspicious actions of one other than appellant. It is there argued that Evan Rodgers' failure to reveal his wife's presence in San Diego somehow directed suspicion against her. To so hold would be to establish a dangerous precedent in that overzealous officers would then be at liberty to "roust" any designated person merely because of the suspicious actions of a party other than the one arrested.

It is interesting to observe the unique manner in which the government seeks to establish Martinez's reliability. Unlike the usual practice which aims to show the informant as a pillar of the community, possessing sterling moral character, and thus meriting credence, appellee herein urges that because Martinez was a heroin addict (Gov. Br. pp. 10, 14), that because he had just violated Title 18, U. S. C. A., Section 1407 (Gov. Br. p. 14), that because he was awaiting trial on a narcotics offense (Gov. Br. p. 10), and that because the information was extracted from him by coercive interrogation combined with promise of benefit (Gov. Br. p. 11) he is somehow very worthy of belief and the agents should have immediately considered him reliable.

Appellant submits that these very considerations mitigate against any reasonable decision by the officers that Martinez was reliable and his information, in and of it-

self, justified an arrest without a warrant. The arrest was unreasonable; appellant's constitutional rights were infringed; and the judgment of conviction must, accordingly, be reversed.

III.

Certain of the Findings of Fact and Conclusions of Law Were Erroneous.

The invalidity of certain of the findings of fact and conclusions of law was treated at length at pages 42-59 of appellant's opening brief. Appellant does not wish to belabor the points and here confines herself to a brief discussion of two points which were erroneously treated in the government's brief.

(a) The Court Did Not Take Judicial Notice That a Delay of Several Hours Would Be Necessitated to Get a Warrant for Appellant's Arrest.

At page 4 of its brief, the government makes the statement that—

> "The Court took judicial notice that if a judge or commissioner were found at home the distance and traffic would cause several hours delay if a Warrant were sought."

The sole reference in the record relating to the time involved in obtaining a warrant is contained at page 151 of the transcript wherein it is stated by the court:

> "* * * Let the record show, first, that the Commissioner lives in Point Loma, and that probably at best, if available at the home, it would be thirty minutes or more before she could be reached."

Despite this clear and simple statement by the court, the government, both in the findings and in its brief, has

persisted in distorting the one-half hour mentioned by the trial court into "several hours." While this point is of small consequence, appellant feels it necessary to correct the discrepancy between the government's allegations and the facts.

(b) The Conclusion of Law That No Search Was Made of Appellant to Secure the Narcotics From Her Is Not Borne Out by the Record.

At pages 27 and 28 of the government's brief the fallacious argument is made that there actually was no search of appellant at all, but rather she voluntarily disclosed to Agent Spohr the heroin which she carried. Appellant extensively treats this question at pages 56 through 59 of her opening brief. At the time that appellant is alleged to have voluntarily disclosed the possession of heroin to Agent Spohr she was in the custody of the federal authorities in San Diego Jail, being marched down a corridor thereof to a detention room where a matron waited to search her. The government disagrees that Agent Spohr demanded to see what appellant held in her hand and by an adroit use of semantics attempts to show the voluntary nature of the disclosure. Agent Spohr testified that he had said to appellant that he would *like* to see what was in her hand. In the context of the circumstances extant at the time, appellant submits it makes little difference whether Agent Spohr said he would *like* to see the narcotics or that he *wanted* to see the narcotics, or that he *insisted* upon seeing the narcotics. The end result is the same. Appellant was in custody and was painfully aware of the fact that she would be searched within the next few minutes. It does not require the overpowering use of physical force to constitute a search. Appellant's rights under the Fourth Amendment against unreasonable search are not to be waived by a mere play on words.

IV.

The Trial Court Erred Under Title 18, U. S. C. A., Section 3500 in Not Permitting Defense Counsel to Inspect the Notes From Which Agent Spohr Testified.

Appellant in Point V of her opening brief took the position that in view of the rule laid down in

> *Jencks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,

the action of the trial court in refusing permission to defense counsel to examine a report from which Agent Spohr testified was error. The government in Point III of its brief takes exception to the applicability of the *Jencks* case and insists that the rule in that case has been superseded by Title 18, U. S. C. A., Section 3500, the so-called "Jencks Statute."

Assuming *arguendo* the correctness of the government's position and further assuming, but not conceding, that

> *United States v. Palermo* (2d Cir., 1958), 258 F. 2d 397,

limits a defendant to the protection of Section 3500, it is appellant's contention that, even under the Jencks Statute, the trial court erred in not permitting the inspection of the questioned report by defense counsel. Section 3500, *supra,* provides in pertinent portion:

> "§3500. Demands for production of statements and reports of witnesses
>
> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discov-

ery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) Afer a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. * * *"

It should in passing be noted from the above quoted material that contrary to the impression gained at page 32 of the government's brief in camera inspection of statements is authorized under Subsection (c), *supra,* only where the government claims that the statement to be inspected contains matter which does not relate to the testimony of the witness. In the instant case no such objection was made by the government; *ergo,* any such in camera inspection was made by the trial court in excess of its authority under this act.

Appellant meets the requirements of Section 3500, *supra*. This was a criminal prosecution brought by the United States. The report was made, not only by a government witness to a government agent, but it was made by a government witness who was himself a government agent. The witness-agent testified in what was stipulated to be the trial of the case. After the witness-agent testified, defendant requested the court to allow defendant the right to inspect the report. The report related to the subject matter to which the witness testified (in fact the witness-agent on at least five occasions had to refer to the report during his testimony [Tr. 138-141, 145, 164, 165]). It is perhaps speculation to suppose that the entire contents of the report related to the testimony, but, as heretofore stated, since the government made no claim that the report contained matter which did not touch on the testimony of the witness-agent, the court had no right to inspect the report in camera and then restrict defendant's examination thereof to one line.

The government contends that not only does the Jencks Statute lack applicability because the testimony of the agent was offered at a hearing under Rule 41(e), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., but also that appellant stipulated to her guilt if her arrest were upheld as legal. The answers to these two arguments are correlative. The stipulation contained at page 56 of the clerk's transcript provides that the proceedings in the Rule 41(e) motion could be considered in lieu of a trial and that appellant waived all objections to the introduction of all evidence except such objections as were raised by appellant on the motion to suppress evidence. The government takes the position that under this stipulation appellant merely wished to have the court reconsider its decision on the Rule 41(e) motion. Such a construc-

tion is not borne out by the record. A separate motion to reconsider was made by the appellant and is contained at page 26, *et seq.*, of the clerk's transcript. Appellant did not waive her right to raise the instant ground since the waiver in the stipulation extended only to the introduction of evidence.

The failure and refusal of the court to allow defense inspection of the report from which Agent Spohr repeatedly testified does not, under any stretch of a fertile imagination, become an objection to the introduction of evidence. Rather, it is a fatal flaw or defect in the conduct of the case by the trial court and, if touched at all in the stipulation, would came under the purview of paragraph three thereof in which appellant reserved all arguments of counsel, documents, and pleadings filed in connection with the motion to suppress. By the stipulation the government and the appellant stipulated that the hearing under Rule 41(e) would substitute for the trial, since to hold a trial would mean a mere reiteration of the Rule 41(e) hearing. Had the government wished to escape the impact of the trial court's violation of the *Jencks* rule, it should have so provided in the stipulation. It did not. Nor can the government successfully contend that defendant did not lay a proper foundation for a demand to inspect Agent Spohr's report. It is clear from the record that the report was presented in court, in fact, Agent Spohr repeatedly referred to it during his cross-examination [Tr. 138-141, 145, 164, 165]. The only foundation which must be laid is such as will show that there is a report in existence and that it relates to the subject matter to which the witness has testified. These requirements were clearly complied with, and the court erred in refusing to allow defense inspection of the report.

Conclusion.

In the premises, appellant urges that her arrest was made without a warrant and without probable cause and her conviction must be reversed. Further, the court should have granted defense counsel the right to inspect Agent Spohr's report. Contentions of the government that the court did not actually deny defendant's request to inspect the notes are mere cavil (Govt. Br. p. 38). Appellant regrets that the government at this and other points in its brief deems it proper to resort to frivolous legal semantic games on an issue as vital as a citizen's constitutional rights and her right to due process of law.

Respectfully submitted,

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